PT SANDIPALA ARTHAPUTRA v. MUEHLBAUER TECHNOLOGIES SDN BHD

HIGH COURT MALAYA, SHAH ALAM
CHOO KAH SING J
[ORIGINATING SUMMONS NO: BA-24NCVC-340-03-2019]
3 JUNE 2021

CIVIL PROCEDURE: *Judgments and orders – Foreign judgment – Application to enforce and recognise Indonesian court judgment for enforcement of judgment debt against Malaysian company in Malaysia – Common law rule – Whether defences raised sufficient to oppose recognition of foreign judgment – Whether Indonesian court had international jurisdiction over Malaysian company – Whether Malaysian company had submitted to Indonesian court's jurisdiction – Whether Indonesian court breached rules of natural justice in arriving at its decision – Whether Indonesian court judgment against Malaysian public policy*

The plaintiff, an Indonesian company, entered into a contract with the defendant, a Malaysian company, to purchase machines, spare parts and services ('contract'). Subsequent to this contract, the parties also entered into an agreement to amend the contract. From this amendment, an arbitration clause was inserted, which spelt out that, in the event any dispute arose from the contract, the parties would agree to settle the matter *via* arbitration in Geneva, Switzerland. Later, the plaintiff terminated the contract and initiated a suit against the defendant at the South Jakarta District Court ('District Court') based on two causes of action, namely, a breach of contract and tort of conspiracy ('suit'). Objecting to the suit, the defendant contended that since an arbitration clause had been elected into the contract, the proper forum to hear the dispute between the parties was through an arbitration and not the District Court. As such, the District Court did not have the jurisdiction to try and decide the dispute between the parties. Nevertheless, the District Court rejected the objection and later made an interlocutory ruling, stating that it had the jurisdiction to hear the suit. The parties thereafter were directed to proceed with the suit on its merits. The District Court ruled that, in regard to the cause of action based on breach of contract, it should be heard and determined before an arbitration. Meanwhile, for the cause of action based on tort of conspiracy, it was decided in favour of the plaintiff. The plaintiff was awarded, *inter alia*, damages of IDR475,384,000,000 (approximately RM138,000,000) ('judgment debt') against the defendant ('District Court's decision'). Dissatisfied with the District Court's decision, the defendants appealed to the High Court of Jakarta and later, to the Supreme Court of Indonesia. Both appeals were dismissed. Exhausting all of the legal avenues available to it in Indonesia, the defendant thereafter applied to the Supreme Court of Indonesia, seeking for a review of the Indonesian apex court's decision to dismiss its appeal. This review application, however, was also met with dismissal. Regardless of

these dismissals, the defendants still failed to satisfy its judgment debt, either in part or in full to the plaintiff. Hence, the plaintiff without any other option, commenced the current application in this court, seeking to enforce the District Court's decision in Malaysia based on the common law rule, considering the fact that the defendant was a Malaysian company, for the judgment debt. In resisting the application, the defendant raised three defences, namely: (i) the District Court did not have the jurisdiction, in the first instance, to hear and decide the suit, in view of the arbitration clause; (ii) the District Court's decision was obtained through a breach of natural justice; and (iii) was a contravention of the Malaysian public policy, for the reasons that: (a) the District Court had wrongly dismissed the defendant's jurisdictional challenge; (b) the damages claimed by the plaintiff were not particularised, proven, punitive and no causation was established; (c) the District Court had not duly considered the defendant's arguments and evidence; and (d) the grounds of judgment did not contain the reasons and provisions of law relied by the parties ('complaints'). Due to these defences, the defendant alleged, the District Court's decision ought not to be enforced against it in Malaysia.

Held (allowing application):

(1) There were four cases where international jurisdiction of the District Court could be established over the defendant. The case relevant to the current application was the third case, which, 'if the person against whom the judgment was given, submitted to the jurisdiction of that country by voluntarily appearing in the proceedings'. In this application, the defendant had defended the merits of the suit as well as contesting the jurisdiction of the District Court. In fact, for this purpose, the defendant appealed all the way to the Indonesian apex court, the Supreme Court of Indonesia. Also, when the District Court made the interlocutory ruling that it had the jurisdiction to hear the suit and directed the parties to proceed on the merits, the defendant had 'acceded' to the direction and proceeded to argue the suit. Since the defendant had voluntarily appeared in the suit, according to the common law rule, the District Court had the jurisdiction (international jurisdiction) over the defendant as the same had clearly submitted to the District Court's jurisdiction. (paras 21-22, 26, 39 & 41)

(2) The common law rule of breach of natural justice mainly focuses on the irregularity of the proceedings. It could not mean the right to encroach into the merits of the case or to re-evaluate the admissibility of evidence. Regarding the proceedings of the suit in the District Court, the defendant (i) was properly notified of the proceedings; (ii) was properly and legally represented in every stage of the proceedings; and (iii) was given his days in court at every opportunity available at every level of the judicial system in Indonesia. On the other hand, the complaints raised (i) touched on the District Court's evaluation and examination of the

merits of the suit and the admissibility of the evidence tendered; (ii) did not go to the failure to observe the rule of natural justice, but, only a mere criticism on the manner the District Courts' judgment was presented; and (iii) in relation to complaint (b), the defendant's reliance on *Adams v. Cape Industries Plc* was not sustainable because there was no such provision of judicial assessment in the Indonesian legal system. As such, there was no breach of 'substantial justice' in *Adams v. Cape Industries Plc*'s sense. Thus, the complaints under the head of defence of natural justice could not avail the defendant any right to oppose the District Court's judgment, hence, the proceedings in the District Court could not in any way be said to have offended this court's view of substantial or natural justice. (paras 45, 47-48, 50-52 & 53)

(3) Public policy consideration in respect of recognition of a foreign judgment under the common law rule mainly centred on the nature of judgment. A complaint under this head must be so blatantly clear that it would 'shock the conscience' of this court or it was so 'clearly injurious to the public good, or wholly offensive to the ordinary reasonable and fully informed member of the public'. Unfortunately, there was none of such in the complaints raised. They could also not be said to harm the public good or interest. Further, the District Court's decision was also not based on laws which were objectively disgraceful, or had produced an outcome which was equally repellent. In fact, the complaints raised, were a disguised grounds of appeal against the District Court's decision. This court is not an appellate court, to re-hear the dispute or scrutinise a foreign judgment for errors. For these reasons, the plaintiff's application was allowed. (paras 59 & 61-63)

Case(s) referred to:

Adams v. Cape Industries Plc [1991] 1 All ER 929 ***(refd)***
Arch Reinsurance Ltd v. Akay Holdings Sdn Bhd [2019] 1 CLJ 305 FC ***(refd)***
Henry v. Geoprosco International [1975] 3 WLR 620 ***(refd)***
Humpuss Sea Transport Pte Ltd (in compulsory liquidation) v. PT Humpuss Intermoda Transportasi TBK And Another [2016] 5 SLR 1322 ***(refd)***
In Re Dulles' Settlement (No. 2), Dulles v Vidler [1951] 1 Ch 842 ***(refd)***
Jan De Nul (Malaysia) Sdn Bhd & Anor v. Vincent Tan Chee Yioun & Anor [2019] 1 CLJ 1 FC ***(refd)***
MTU Maintenance Berlin-Brandenburg GMBH v. MASER (M) Sdn Bhd [2019] 1 LNS 1301 HC ***(refd)***
PNG Oxygen Limited v. Lim Kok Chuan [2018] 1 LNS 237 HC ***(refd)***
Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd [2016] 9 CLJ 1 FC ***(refd)***
PT Adhiyasa Saranamas v. Kumpulan Guthrie Bhd & Ors [2014] 1 MLJevi 91 ***(refd)***
Rubin v. Eurofinance SA; New Cap Reinsurance Corp (In Liq) v. Grant [2013] AC 236 ***(refd)***
Sanwell Corporation v. Trans Resources Corporation Sdn Bhd & Anor [2002] 3 CLJ 213 FC ***(refd)***
See Hua Daily News Bhd v. Tan Thien Chin & Ors [1985] 1 LNS 131 SC ***(refd)***
Sigur Ros Sdn Bhd v. Master Mulia Sdn Bhd [2018] 8 CLJ 291 CA ***(refd)***

The University Of British Columbia v. Lim Siew Eng [2020] 1 LNS 710 HC ***(refd)***
Tindak Murni Sdn Bhd v. Juang Setia Sdn Bhd & Another Appeal [2020] 4 CLJ 301 FC ***(refd)***

Legislation referred to:
Arbitration Act 1952 (repealed), s. 6
Arbitration Act 2005, ss. 10, 37(2)(a)
Reciprocal Enforcement of Judgments Act 1958, ss. 4, 5(1)(a)(ii), (iii), (iv), (v), (3)(b), First Schedule

Civil Jurisdiction and Judgments Act 1982 [UK], s. 33(1)

Other source(s) referred to:
Adrian Briggs, *The Conflict of Laws*, 4th edn, Clarendon Law Series, 2019, pp 131, 132, 145, 147
Dicey, Morris and Collins on The Conflict of Laws, 15th edn, vol 1, Sweet & Maxwell, Thomson Reuters, pp 689, 740, 741, r 43
Halsbury's Laws of Malaysia, vol 3(2), 2015 Reissue, LexisNexis, pp 86, 88, paras [90.95], [90.097], [90.100]

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JUDGMENT

Choo Kah Sing J:

Introduction

[1] The plaintiff's cause of action was based on the common law rule of recognising and enforcing a foreign judgement *in personam* in Malaysia. This court has heard the oral submission and read the extensive written submissions of the parties' counsels respectively. On 12 May 2021, this court allowed the plaintiff to enter judgment against the defendant. The reasons for the decision of this court are set out below.

Brief Background Facts

[2] The plaintiff company, an Indonesian entity, brought a civil suit against one Muehlbauer AG (a German entity) and the defendant, a Malaysian entity, as the first and second defendants respectively, in the South Jakarta District Court (hereafter "the District Court"). The plaintiff's suit in the District Court was premised on two causes of action, namely, breach of contract and tort of conspiracy (hereafter "the unlawful act claim"). The latter is considered as an illegal act under art. 1365 of the *Indonesian Civil Code, Book Three – Contract*, under the heading Chapter III – Contracts arising by force of law.

[3] The plaintiff's suit in the District Court stemmed from a contract dated 26 May 2011 which was entered into between the parties. In the said contract the plaintiff agreed to purchase machines, spare parts and services from the defendant worth €9.478 million. Subsequent to the said contract, the parties entered into an agreement to amend the said contract which is known as Amendment No. 1 dated 13 September 2011. In the Amendment No. 1 dated 13 September 2011, the parties inserted, *inter alia*, an arbitration clause as follows:

> In the event there is a dispute arising from the contract and this amendment between the parties, both parties agree to settle the dispute by arbitration using the ICC rules. The location of arbitration is Geneva in Switzerland. The result of arbitration is final and cannot be appealed. The party that lost in arbitration will cover the arbitration costs.

[4] On 16 February 2012, the plaintiff terminated the contract and the Amendment No. 1. Flowing from the termination of the contract and the Amendment No. 1, the plaintiff took out the civil suit against the defendant (and Muehlbauer AG) based on the two causes of action.

[5] At the District Court, the defendant contended that the parties had by an agreement elected arbitration as the forum to resolve any dispute arising from the contract between the parties. As such, the District Court did not have jurisdiction to hear and decide the plaintiff's suit.

[6] On 6 May 2013, the District Court made an interlocutory ruling that it had the jurisdiction to hear the plaintiff's suit, and directed the parties to proceed with the action on its merits. On 28 August 2013, the District Court ruled that the cause of action based on breach of contract should be determined by arbitration. With regard to the cause of action based on unlawful act claim, the District Court went ahead to make a decision. The District Court decided in favour of the plaintiff and awarded, *inter alia*, damages of IDR475,384,000,000 (approximately RM138,000,000+) against the defendant (and Muehlbauer AG jointly and/or severally) (hereafter the "District Court's judgment").

[7] Dissatisfied with the decision, the defendant appealed to the High Court of Jakarta. On 4 September 2013, the High Court of Jakarta dismissed the defendant's appeal. The defendant further appealed to the Supreme Court of Indonesia which is the highest court in the Indonesian court system. On 29 March 2016, the apex court of Indonesia dismissed the defendant's appeal. The defendant applied to the apex court to review its decision. On 11 April 2018, the application was dismissed by the apex court of Indonesia. Insofar as the Indonesian legal system is concerned, the defendant had exhausted all its legal avenues to challenge the District Court's judgment. Although the defendant had failed in all the attempts to challenge the decision of the District Court, the defendant (and/or Muehlbauer AG) did not satisfy

the judgment debt in part or in full. This left the plaintiff without option, but to take out this originating summons against the defendant in Malaysia since the defendant is a Malaysian entity.

The Findings Of This Court

Recognising And Enforcing A Foreign Judgment

[8] Essentially, the enforcement of a foreign judgment in Malaysia could be effected through either statutory enforcement or the common law rule of enforcement. A foreign judgment obtained in countries listed in the First Schedule of the Reciprocal Enforcement of Judgments Act 1958 (Revised 1972) Act 99 (hereafter "the REJA") could be enforced in Malaysia by way of an application to have the foreign judgment registered in the High Court in accordance with s. 4 of the REJA.

[9] Foreign judgments obtained in countries other than the countries listed in the First Schedule, have to be enforced through the common law rule. The foreign judgment provides the cause of action itself. In order for the foreign judgment to have the force of law locally, the judgment creditor is required to obtain a local judgment recognising the foreign judgment in Malaysia. Armed with the local judgment recognising the foreign judgment, the judgment creditor could now enforce the local judgment just like any judgement creditor enforcing a judgment in Malaysia. It is said that "the foreign judgment, if it satisfies the requirement of the common law, is understood to create an obligation, a tie of law, by which the parties are bound and which may be enforced" (see Adrian Briggs, *The Conflict of Laws*, 4th edn, Clarendon Law Series, 2019, p. 131).

[10] For the Malaysian court to recognise a foreign judgment under the common law rule, the foreign judgment which the plaintiff's action is mounted on must be for a definite sum and is final and conclusive (see *PT Adhiyasa Saranamas v. Kumpulan Guthrie Bhd & Ors* [2014] 1 MLJevi 91, p. 95, (HC); and *The University Of British Columbia v. Lim Siew Eng* [2020] 1 LNS 710, (HC)). Upon satisfying these pre-conditions, the local court would enter judgment recognising the foreign judgment, unless there is/are sustainable defences which have been raised opposing its recognition.

[11] Our then Supreme Court in *See Hua Daily News Bhd v. Tan Thien Chin & Ors* [1985] 1 LNS 131; [1986] 2 MLJ 107, p. 109, has set out only four defences that avail to a defendant opposing the recognition of a foreign judgment under the common law. The apex court held as follows:

> In an action on the judgment at common law, one or more of the following defences may be raised – (1) that the foreign court had no jurisdiction; (2) that the judgment was obtained by fraud; (3) that the judgment would be contrary to public policy, and (4) that the proceedings in which the judgment was obtained were opposed to natural justice.

[12] The apex court observes that similar defences are also available under s. 5 of the REJA (see s. 5(1)(a)(ii), (iii), (iv) and (v)). The common law defences have been examined and tested in our Malaysian courts on numerous occasions (see *PNG Oxygen Limited v. Lim Kok Chuan* [2018] 1 LNS 237, (HC) and; *MTU Maintenance Berlin-Brandenburg GMBH v. MASER (M) Sdn Bhd* [2019] 1 LNS 1301, (HC)).

[13] The Malaysian courts are ready and willing to recognise a foreign judgment in five circumstances where the foreign judgment *in personam* was obtained, namely (i) where the defendant is a subject of the foreign country in which judgment has been obtained; (ii) where the defendant was resident in the foreign country when the action began; (iii) where the plaintiff has selected the forum in which he afterwards sues; (iv) where the defendant has voluntarily appeared; and (v) where the defendant has contracted to submit himself to the forum in which judgment was obtained (see *Halsbury's Laws of Malaysia*, vol. 3(2), 2015 Reissue, LexisNexis, p. 86, para. [90.95]). All these five circumstances are related to the establishment of the "international jurisdiction" of the foreign court over the defendant.

[14] To surmise, the considerations to be taken by the court in Malaysia to recognise a foreign judgment under the common law rule are: (i) whether the foreign judgment is a final and conclusive judgment; (ii) whether the foreign court has jurisdiction which is in accord with the private international law of Malaysia; and (iii) whether there is any defence to its recognition? These are the same considerations taken by the Singapore High Court in the decision of *Humpuss Sea Transport Pte Ltd (in compulsory liquidation) v. PT Humpuss Intermoda Transportasi TBK And Another* [2016] 5 SLR 1322, p. 1343.

Analysis And Reasoning Of The Present Case

[15] The parties had agreed that the District Court's judgment and the other decisions of the higher courts in Indonesia are final and conclusive and that the judgment is for a definite sum of money.

[16] It is said that "a judgment is 'final' if it cannot be reopened or reconsidered in the court which made it, even though it may be subject to appeal to a higher court; it is "conclusive" if it represents the court's settled answer on the substance of the point adjudicated" (see Adrian Briggs, *The Conflict of Laws* (*supra)*, p. 132). As such, the defendant in the present case is precluded from re-litigating the merits of the case as it is *res judicata* between the parties. *A fortiori* the foreign judgment could not be impeached on its merits.

[17] To oppose the recognition of the foreign judgment, the defendant had raised three defences. First, the defendant raised the defence that the Indonesian courts did not have jurisdiction to hear and decide the unlawful act claim in view of an arbitration clause. Secondly, the defendant also raised a defence that the foreign judgment was obtained in breach of natural justice.

Lastly, the defendant contended that the foreign judgment was contrary to the Malaysian public policy. This court will deal with each of the defence *ad seriatim*.

Lack Of Jurisdiction

[18] In relation to the defence of lack of jurisdiction, the apex court in *See Hua Daily News Bhd* (*supra*) mentioned "the foreign court had no jurisdiction" as one of the defences that avail to the party opposing the recognition of a foreign judgment under the common law rule in Malaysia. The word "jurisdiction" has been understood as referring to the foreign court not having the "international jurisdiction". It simply means the foreign court does not have jurisdiction over the defendant as determined by the private international law rules in Malaysia.

[19] The defendant's counsel submitted that "where an arbitration clause is present, a Malaysian court will not recognise and enforce a foreign judgment as the foreign court did not have jurisdiction to hear and determine the dispute". Learned counsel cited *Halsbury's Laws of Malaysia* (*supra*), para. [90.100]) which states as follows:

> Although the conflict of laws rules may lead to the provisional conclusion that a court did have international jurisdiction, a judgment given by a court of an overseas country must not be recognised or enforced in Malaysia if the proceedings were brought contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of that country. However, this protection is lost if the defendant agreed to the bringing of the proceedings in that court, or is he counterclaimed in the proceedings or otherwise submitted to the jurisdiction of the court. The Malaysian court is not bound by any decision of the oversea court on the matter.

[20] It is not in dispute that there existed an arbitration clause which on the face value was binding on the parties, the crucial question is – did the defendant submitted itself to the jurisdiction of the foreign court? If it did, the defendant would lose its protection, even the arbitration clause could have covered the dispute of the unlawful act claim.

[21] According to *Dicey, Morris and Collins on The Conflict of Laws*, 15th edn, vol. 1, Sweet & Maxwell, Thomson Reuters, p. 689, r. 43, there are four cases where international jurisdiction of the foreign court could be established over the defendant. It states as follows:

> First Case – If the person against whom the judgment was given was, at the time the proceedings were instituted, present in the foreign country.
>
> Second case – If the person against whom the judgment was given was claimant, or counterclaimed, in the proceedings in the foreign court.
>
> Third case – If the person against whom the judgment was given, submitted to the jurisdiction of that country by voluntarily appearing in the proceedings.

> Fourth Case – If the person against whom the judgment was given, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of that country.

[22] The third case seems to be relevant for the discussion here. The text in relation to the third case goes on as follows:

> **The third case. Appearance**. This case rests on the simple and universally admitted principle that a litigant who has voluntarily submitted himself to the jurisdiction of a court by appearing before it cannot afterwards dispute its jurisdiction. Where such a litigant, though a defendant rather than a claimant, appears and pleads to the merits without contesting the jurisdiction there is clearly a voluntary submission. **The same is the case where he does indeed contest the jurisdiction, but nevertheless proceeds further to plead to the merits**, or agrees to a consent order dismissing the claims and cross-claims, or where he fails to appear in proceedings at first instance but appeals on the merits. If the defendant takes no part in the proceedings and allows judgment to go against him in default of appearance, and later moves to set the default judgment aside, the application to set aside may be a voluntary appearance if it is based on non-jurisdictional grounds, even if the application is unsuccessful ...
>
> (emphasis added)

[23] Clearly, in the event the defendant had in its defence pleaded the merits of the case, despite contesting the jurisdiction of the court in hearing the proceedings, in this circumstance, it could well be considered that the defendant had submitted to the jurisdiction of the court.

[24] The defendant had raised the objection against the jurisdiction of the court to hear the proceedings, but it failed. The defendant went ahead to defend the claim on the merits, and the merits were adjudicated. As the defendant failed in its jurisdiction challenge and went ahead to defend the plaintiff's claim on the merits, the defendant would be bound by the decision of the court – whether in its favour or not. The defendant has to accept the upshot of the hearing of the merits by the court. For that reason alone, the defendant could not argue that it did not submit to the jurisdiction of the court. This proposition could be bolstered by the English case of *In Re Dulles' Settlement (No. 2), Dulles v. Vidler* [1951] 1 Ch 842, at p. 850, wherein the Court of Appeal in the judgment of Lord Denning states as follows:

> ... I quite agree, of course, that if he fights the case, not only on the jurisdiction, but also on the merits, he must then be taken to have submitted to the jurisdiction, because he is then inviting the court to decide in his favour on the merits; and he cannot be allowed, at one and the same time, to say that he will accept the decision on the merits if it is favourable to him and will not submit to it if it is unfavourable. But when he only appears with the sole object of protesting against the jurisdiction, I do not think that he can be said to submit to the jurisdiction: see *Tallack v. Tallack* (12), per Lord Merrivale, P.

[25] The judgment of His Lordship Evershed MR stated in the same vein:

> It is, of course, plain that where a question of jurisdiction arises a man cannot both have his cake and eat it. He cannot fight the issue on the merits, and at the same time preserve the right to say, if the worst comes to the worst, that the court has no jurisdiction to decide against him. And he cannot, consistently with that principle, take any step unequivocally referable to the issue on the merits ...

[26] In the present case, it was not in dispute that the defendant had defended the merits of the case as well as contested the jurisdiction of the foreign court. The defendant did both all the way from the court of first instance to the apex court in Indonesia. The District Court had on 6 May 2013 made a ruling that it had the jurisdiction to determine the unlawful act claim and directed the parties to proceed on the merits. The defendant "acceded" to the direction and proceeded to argue the case on the merits. The outcome was not in favour of the defendant after the merits had been heard, and the decision was delivered on 28 August 2013. Based on these facts, this court could hardly accept the submission that the defendant did not submit to the jurisdiction of the Indonesia court.

[27] The *Halsbury's Laws of Malaysia* (*supra*), p. 88, para. [90.097] states as follows:

> **Actual Submission** A foreign court has jurisdiction to pronounce a judgment in *personam* capable of recognition and enforcement in Malaysia if the defendant submitted or agreed to submit to the jurisdiction of the foreign court.
>
> There is clearly submission where the defendant, in his character as claimant in the foreign action, himself selected the forum where the judgment was given against him, whether this took the form of dismissal of his claim or judgment against him in respect of a counterclaim. Cross-action or costs.
>
> The defendant may also be held to have submitted where he voluntarily appeared in the foreign action. However, if the purpose of the appearance was any or all of the following, namely:
>
> (1) to contest the jurisdiction of the court;
>
> (2) to seek dismissal or stay of proceedings on the ground that the dispute should be submitted to arbitration or to the determination of the courts of another country; or
>
> (3) to protect or obtain the release of property seized or threatened with seizure,
>
> then the appearance may amount to a submission.
>
> It appears that it is the purpose of the appearance, rather than the form which it actually took, which is the determining factor, and if the defendant was in effect constrained by local procedure to enter a defence on the merits at the same time as the challenge to the jurisdiction, he will be entitled to argue that he did not submit. However, if the entry of a

defence on the merits was not required at the same time as the challenge to the jurisdiction, it is open to a court to conclude that, by entering it, he did submit to the jurisdiction of the foreign court.

[28] According to the above passage, even if the purpose of the appearance was to contest the jurisdiction of the court, the appearance may amount to a submission; and appearing to seek dismissal of the proceedings on the ground that the dispute should be submitted to arbitration may also amount to a submission. Hence, under the Malaysian private international law, the defendant is regarded as having submitted to the jurisdiction of the foreign court.

[29] The defendant's counsel submitted that based on their experts' opinion, there is no such concept of submission to the jurisdiction of the Indonesia courts. Even if that is correct, the issue of submission has to be considered from the perspective of the Malaysian common law and private international law (see *Rubin v. Eurofinance SA; New Cap Reinsurance Corp (In Liq) v. Grant* [2013] AC 236, pp. 342 to 343), otherwise, no foreign judgment originates from the Indonesia court could be recognised in Malaysia on this issue alone.

[30] The defendant's counsel relied on the legal proposition of *Sanwell Corporation v. Trans Resources Corporation Sdn Bhd & Anor* [2002] 3 CLJ 213, 230, (FC), which the apex court states: "... the court will then have to consider whether such action amounts to a step in the proceedings by determining the nature of the action and whether or not it indicates an unequivocal intention to proceed with the suit and to abandon the right to have the dispute disposed off by arbitration".

[31] The apex court was speaking in reference to the Malaysian legal proceedings, particularly the then Rules of the High Court 1980, and also in reference to s. 6 of the then Arbitration Act 1952, as to what could be constituted as steps in the proceedings. The apex court was not referring to the common law rule of recognition of a foreign judgment in regard to the submission to the jurisdiction of the foreign court by the defendant's appearance in the proceedings. Hence, the proposition in the apex court could be distinguished from and is not relevant in the present case here.

[32] The defendant's counsel had also raised the issue that the Indonesia courts do not have jurisdiction to hear the unlawful act claim *per se*, because the dispute of unlawful act claim was covered under the arbitration clause. The defendant's counsel's submission seems to suggest that the arbitration clause had ousted the jurisdiction of the court. This court is of the considered view that first, an arbitration clause could not oust the jurisdiction of the court (see *Sanwell Corporation* (*supra*), p. 223), and that the power to adjudicate any matter arising from its territorial state always remains intact with the courts. Secondly, the exercise of the discretion to adjudicate or not to adjudicate a subject matter is always within the inherent powers of the courts. Third, if a court exercises its inherent powers to adjudicate the

matter, the decision is binding and will carry the force of law of the State. What the defendant's experts had relied on to State that the Indonesia courts had no jurisdiction to adjudicate the unlawful act claim was based on *2005 SC Guidelines and Technical Administrative and General Judiciary Guidelines*, 2007 edn. The plaintiff's expert opines that those guidelines were not law and could not be binding on the Indonesia courts.

[33] The defendant's counsel had invited and urged this court to give a wide interpretation to the arbitration clause. This court is not ready to do so simply because by doing so, this court would be re-opening the case and re-litigating the jurisdiction argument which had been ventilated by the defendant's counsel(s) (in Indonesia) in the foreign court.

[34] The defendant's counsel had also invited and urged this court to take into consideration the jurisdictional impact of an arbitration clause referring to REJA, particularly s. 5(3)(b), read together with s. 10 of the Arbitration Act 2005.

[35] Learned counsel had also cited recent apex court decisions pressing upon the fact that the courts (local courts) have to embrace an arbitration clause and to give full effect to it (see *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd* [2016] 9 CLJ 1, at p. 17, (FC); *Arch Reinsurance Ltd v. Akay Holdings Sdn Bhd* [2019] 1 CLJ 305, at p. 324, (FC); *Tindak Murni Sdn Bhd v. Juang Setia Sdn Bhd & Another Appeal* [2020] 4 CLJ 301, at p. 319, (FC)).

[36] This court is of the considered view that the law in relation to enforcement of a foreign judgment by way of statutory enforcement is not the same with the common law rule for recognition of foreign judgments. Each has its own set of rules. The former is a statute law, and its principles are expounded by local cases. The latter is purely based on the English common law rule that has been applied in Malaysia.

[37] In the English common law in the case of *Henry v. Geoprosco International* [1975] 3 WLR 620, p. 639, the Court of Appeal held as follows:

> But, we do think that the authorities compel this court to say that if such protest takes the form of or is coupled with what in England would be a conditional appearance and an application to set aside an order for service out of the jurisdiction and that application then fails, the entry of that conditional appearance (which then becomes unconditional) is a voluntary submission to the jurisdiction of the foreign court. The defendant need not appear there, conditionally or unconditionally. He can stay away. But as the cases say, he may prefer to take his chance upon a decision in his favour. If he does so, he must also accept the consequences of a decision against him.

[38] In the present case, the defendant from the onset raised objection to the District Court's jurisdiction. Based on the above passage, the legal proposition is that since the defendant had taken its chance, it must accept the consequences of the decision against him. This is based on the common law position.

[39] The harsh common law principle in England was mitigated by the enactment of the Civil Jurisdiction and Judgments Act 1982 (UK) s. 33(1). However, the common law principle remains the jurisprudence of the law in Malaysia for the recognition and enforcement of a foreign judgment under the common law rule. Hence, according to the common law principle, the defendant had submitted to the jurisdiction of the District Court in Indonesia.

[40] This court is of the considered view that it could not apply a principle based on the reading of a Malaysian statute and cases based on the Malaysian law to expand and supersede an established common law principle in relation to recognition of a foreign judgment under the common law rule. The apex court cases which were cited by the learned defendant's counsel are not dealing with the law of recognition of a foreign judgment. The cases and their principles are separate law from the established common law rules in relation to recognition of foreign judgment in Malaysia.

[41] To surmise on the jurisdiction issue, based on the above analysis, this court is of the considered view that the Indonesia courts had the jurisdiction (international jurisdiction) over the defendant because the defendant had clearly submitted to the jurisdiction as explained.

Breach Of Natural Justice

[42] The defendant's counsel complained that: (i) the Indonesia courts wrongly dismissed the jurisdictional challenge; (ii) the damages were not particularised, not proven, were punitive and causation was not established; (iii) the Indonesian courts did not duly consider the defendant's arguments and evidence; and (iv) the grounds of judgment did not contain reasons and the provisions of law relied upon.

[43] It is useful to begin with the English Court of Appeal decision in *Adams v. Cape Industries Plc* [1991] 1 All ER 929, at p. 1049, wherein it states as follows:

> It is sufficient, in our view, to derive the requirements of natural justice for the purposes of enforcement of foreign judgment and the special defence thereto of breach of natural justice from the principles stated in *Perberton v. Hughes* [1899] 1 Ch 781 and relied upon by Scott J., namely: **did the proceedings in this foreign court offend against our views of substantial justice**?"
>
> (emphasis added)

[44] The Court of Appeal, at p. 1052, goes on to say:

> It is well established that a defendant, shown to have been subject to the jurisdiction of a foreign court, *cannot seek to persuade our court to examine the correctness of the judgment whether on the facts, or as to the application by the foreign court of its own law or, when relevant, of the law of this country. A foreign judgment is not impeachable merely because it is 'manifestly wrong'*: see *Godard v. Gray* (1870) LR 6 QB 139, *Castrique v. Imrie* (1870) LR 4 HL 414, [1861] All ER Rep 508 and *Robinson v. Fenner* [1913] 3 KB 835 at 842. *In any such case it*

A *could be said that there has been a breach of natural justice, but it is not a type of breach which our courts will consider relevant. In effect, their attitude is that the only way in which the defendant can seek to correct an error of substance made by the foreign court is by using such means for correction of error as may be provided under the foreign system.*

B (emphasis added)

[45] Essentially, the defendant's counsel's complaints (i) and (iii) are intertwined. The complaints go to the evaluation and examination of the merits and evidence in the foreign court proceedings and how the foreign court arrived at its decision. This court is of the considered view that looking C into these complaints would step outside the permitted periphery of the role of this court.

[46] The complaints do not strike the cord of a breach of natural justice. The mere fact that the defendant was not satisfied with the decision of the foreign courts does not trigger any breach of the principle of natural justice. D Even if the evaluation of the evidence and arguments by the foreign court was questionable and led to the foreign court being "manifestly wrong" in its conclusion, the foreign judgment is still not impeachable based on the principle enunciated in *Adams v. Cape* (*supra*). The defendant had exhausted its right to appeal in the Indonesia legal system. Therefore, the defendant had E to accept it. The defendant could not go to another jurisdiction and to reopen the evidence and have a second bite of the cherry.

[47] With regard to the defendant's counsel's complaints (ii) and (iv), this court is of the considered view that they do not go to the failure to observe the rule of natural justice. They are rather a criticism of the manner which F the foreign court's judgment was presented. Again, the complaints, especially the complaint (ii), touch on the evidence of the proceedings which is off-limit for this court to consider.

[48] The common law rule of breach of natural justice mainly focuses on the irregularity of the proceedings. As in *Dicey, Morris And Collins* (*supra*), G p. 740, has this to say:

> In a celebrated passage in his judgment in *Pemberton v. Hughes* (a case on the recognition of a foreign divorce decree), Lord Lindley observed: 'if a judgment is pronounced by a foreign court over persons within its jurisdiction and in a manner with which it is competent to deal, English H courts never investigate the propriety of the proceedings in the foreign court, unless they offend against English views of substantial justice.' *This passage refers to irregularity in the proceedings, for it is clear that a foreign judgment, which is manifestly wrong on the merits or has misapplied English law or foreign law, is not impeachable on that ground. Nor is it impeachable because the court admitted evidence which is inadmissible in England or did not admit evidence which* I *is admissible in England or otherwise followed a practice different from English law*. In *Jaconson v. Frachon,* Atkin L.J., after referring to the use of the expression 'principles of natural justice', said: 'Those principles seem to me to involve this, first of all that the court being a court of competent

jurisdiction, has given notice to the litigant that they are about to proceed to determine the rights between him and the other litigant; the other is that having given him the notice, it does afford him an opportunity of substantially presenting his case before the court.

(emphasis added)

[49] Likewise, in Adrian Briggs, *The Conflict of Laws* (*supra*), p. 145, it states as follows:

If the proceedings in the foreign court fell short of the standards set by the rules of natural justice such as the right to be sufficiently notified, properly represented, fairly heard, or if the foreign court violated the principle of finality by reopening a decision for no proper reason, it may be possible to deny recognition to the judgment. The common law provided rather little supporting authority, but it was never doubted that the defence, usually framed in terms of natural or substantial justice, was available to prevent recognition.

[50] Hence, the phrase "substantial justice" could not mean the right to encroach into the merits of the case or to re-evaluate the admissibility of evidence. The principle enunciated in *Adams v. Cape* (*supra*) in regard to "substantial justice" has to be understood in its context. The English court found there was a breach because it was provided in the United States' legal system provisions for judicial assessment of damages, and that such a proceeding was not accorded to the judgment debtors, therefore, in that sense substantial justice had been violated. In *Dicey, Morris And Collins* (*supra*), at p. 741, referring to the decision of *Adams v. Cape* has this to say:

... The Court of Appeal did not decide that a lack of judicial assessment of damages is *per se* a breach of natural justice; but it is a breach where the foreign legal system contains provision for judicial assessment and the judgment debtor therefore has a reasonable expectation that there will be a judicial assessment.

[51] The reliance of *Adams v. Cape* by the defendant's counsel in relation to complaint (ii) is not sustainable because there was no such provision of judicial assessment of damages in the Indonesia legal system. As such, there was no breach of "substantial justice" in *Adam v. Cape*'s sense.

[52] Based on the above common law rules, this court could not find the defendant's counsel's complaints under the head of defence of breach of natural justice could avail the defendant any right to oppose the recognition of the foreign judgment.

[53] This court is satisfied that the defendant was properly notified of the proceedings, the defendant was properly and legally represented in every stage of the proceedings, and the defendant was given his days in court at every opportunity available at every level of the judicial system in Indonesia. Hence, the proceedings in the foreign court could not in any way offend against this court's view of substantial justice or natural justice, whichever label is attached to the term.

Contrary To Malaysian Public Policy

[54] The defendant's counsel submitted that the foreign judgments were contrary to the Malaysian public policy for the following reasons: (i) the Indonesia courts wrongly dismissed the jurisdictional challenge; (ii) the damages were not particularised, not proven, were punitive and causation was not established; (iii) the Indonesian courts did not duly consider the defendant's argument and evidence; and (iv) the grounds of judgment did not contain reasons and the provisions of law relied upon.

[55] The public policy consideration in respect of recognition of a foreign judgment under the common law rule is mainly centred on the nature of the judgment. "Judgment based on laws which are objectively disgraceful, or on laws which produce an outcome which is equally repellent, for example, will be denied recognition" (see Adrian Briggs, *The Conflict of Laws* (*supra*), p. 147).

[56] In Malaysia, the Federal Court in *Jan De Nul (Malaysia) Sdn Bhd & Anor v. Vincent Tan Chee Yioun & Anor* [2019] 1 CLJ 1, at p. 15, cited the Court of Appeal decision in *Sigur Ros Sdn Bhd v. Master Mulia Sdn Bhd* [2018] 8 CLJ 291, with approval and stated as follows:

> … As clearly stated by the Court of Appeal in *Sigur Ros* (with which we agree): "The concept of public policy must be one taken in the higher sense where some fundamental principle of law or justice is engaged, some element of illegality, where enforcement of the award involves clear injury to public good or the integrity of the court's process or powers will be abused".

[57] In both the decisions, the superior courts were making reference to an arbitration award and its proceedings, particularly in reference to the interpretation of the term "public policy" in the Arbitration Act 2005. What could be deduced from the higher courts' reasoning of "public policy" is that it "signifies some matter which concerns public good and public interest".

[58] A decision obtained by means of fraud or corruption is clearly against the public good and public interest (see s. 37(2)(a) of the Arbitration Act 2005). And, borrowing from the words of Adrian Briggs, "judgment (referring to foreign judgment) based on laws which are objectively disgraceful, or on laws which produce an outcome which is equally repellent", surely they are against the public good and public interest in Malaysia. "Public good" or "public interest" is synonymous to the public weal.

[59] All of the complaints raised by the defendant's counsel could not been said to harm the public good or public interest. The mere fact that the Indonesia courts dismissed the jurisdictional challenge could not by itself be contrary to our Malaysian public policy. The defendant was given every

opportunity at every level to challenge the jurisdiction of the Indonesia court. The complaint that the damages were not particularised, not proven, were punitive and causation was not established, all go to the evidence and merits of the decision of the foreign court, and such complaint does not go to prove the foreign court proceeding was contrary to public policy of Malaysia. The same applies to the third and fourth complaints.

[60] This head of defence of foreign court proceeding being contrary to public policy to oppose the recognition of foreign judgment should not be treated as an "all-encompassing" defence. The defendant's complaints levelled against the foreign courts and their judgments could not be said to have establish that the foreign court proceedings or the foreign judgment were against the public policy in Malaysia.

[61] This court has to refrain from probing into the merits of the claim tried and decided by the foreign court. This court in exercising its judicial discretion has to be guided by the common law rule principles in recognising a foreign judgment. As such, a complaint under this head has to be so blatantly clear that it would "shock the conscience" of this court, or that the complaint is so "clearly injurious to the public good, or wholly offensive to the ordinary reasonable and fully informed member of the public". Unfortunately, this court could not see this element in any of these in the defendant's complaints. This court also could not find the foreign judgment was based on laws which are objectively disgraceful, neither has it produced an outcome which is equally repellent.

[62] The defendant's complaints were disguised grounds of appeal against the decision of the foreign court. This court or the Malaysian courts is not an appellate court to rehear the dispute or scrutinise the foreign judgment for errors.

Conclusion

[63] For the reasons stated above, this court had allowed the plaintiff to enter judgment against the defendant. This court ordered costs of RM50,000 (subject to allocator fees) to be paid to the plaintiff by the defendant. This court further ordered that the security deposit of RM100,000 (together with interest) paid by the plaintiff to be refunded.

[64] On a final note, this court wishes to record its appreciation to both parties' counsels for their meticulous arguments and comprehensive written submissions.